BOARD OF COUNTY COMMISSIONERS,
OURAY COUNTY, COLORADO

IBLA 75-451 Decided October 7, 1975

Appeal from decision of the Colorado State Office, Bureau of Land Management, rejecting application for patent under the Recreation and Public Purposes Act (C 20042).

Affirmed.

1. Administrative Procedure: Generally -- Applications and Entries: Vested Rights -- Recreation and Public Purposes Act

   The rejection of an application for the purchase of land under the Recreation and Public Purposes Act does not violate the tenets of due process since the disposition of the application is at the discretion of the Department, and the applicant has acquired no vested right protected by the United States Constitution.

2. Applications and Entries: Generally -- Recreation and Public Purposes Act

   The Recreation and Public Purposes Act authorizes the Secretary, in his discretion, to sell or lease tracts of national resource lands. The proposed mode for financing the development of land applied for pursuant to the Recreation and Public Purposes Act cannot compel issuance of a patent instead of a lease if issuance of a patent would be contrary to the public interest as determined by the Secretary

> or his delegate. Thus, in the event the applicant has secured financial resources by promising acquisition of title to the land, the proper action is not for the Bureau of Land Management to change the applicant's tenure status in violation of the public interest, but rather for the applicant to secure alternate financing arrangements.

APPEARANCES: Richard P. Tisdel, Esq., County Attorney, Ouray County, Colorado, for appellant.

OPINION BY ADMINISTRATIVE JUDGE RITVO

The Board of County Commissioners, Ouray County, Colorado (hereafter County), has appealed from a decision of the Colorado State Office, Bureau of Land Management (BLM), dated March 26, 1975, rejecting the County's application to purchase federal lands pursuant to the Recreation and Public Purposes (R&PP) Act of June 14, 1926, as amended, 43 U.S.C. § 869 et seq. (1970).

On January 9, 1974, the County filed its purchase application for 40 acres in the E 1/2 NW 1/4 NW 1/4, W 1/2 NE 1/4 NW 1/4 sec. 3, T. 45 N., R. 8 W., N.M.P.M., Ouray County, Colorado. 1/ The County proposed to use the land for a combination gravel pit, sanitary landfill site, and public recreation area. The subject land is situated in the middle of a 1,040-acre block of national resource lands.

In its application, the County proposed to develop an initial recreation phase project which would provide for a picnicking and camping area adjacent to the landfill and gravel pit site. The estimated cost of the recreation development was $54,216, with the County anticipating receiving half the necessary funding from the State's Land and Water Conservation (LWC) Program. See 16 U.S.C. § 4601-4 et seq. (1970). In its R&PP Act application, and in its petition for LWC funds, appellant stated that its long-range goal was to:

1/ Appellant did not submit a petition for classification along with its application. See 43 CFR 2741.2(a). A portion of the subject tract was classified for sale or lease under the R&PP Act (35 F.R. 18300 (December 1, 1970)), however, the remaining area must also be classified prior to any sale or lease under the Act.

> a. Continue utilizing the gravel and sanitary landfill capability resources over the next several years in conjunction with the initial, limited recreation program * * * and,
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> b. As those resources are being exhausted to develop the site to maximize its recreational usefulness. The utilization of the reclaimed gravel pit, excavation areas and sanitary landfill cells will become important parts of the master recreation plan * * *.

The County additionally emphasized that as a result of this multiple-use development it would be able to close three trash dumps at Ouray, Ridgway and Colona, which were unsatisfactory and did not meet environmental protection requirements.

Following receipt of appellant's application, the BLM proceeded to review the development and management plans to determine their adequacy and effectiveness, and to evaluate the construction schedule and financing arrangements to insure that they were realistic and practicable in relation to the resources available to the applicant. The BLM also secured the views of other agencies having an interest in the land.

In a BLM memorandum dated March 18, 1974, the Chief, Division of Technical Services, noted that while appellant's application included an initial recreation development plan, it did not include a timetable for development showing the annual proposed construction and costs of the "Master Recreation Plan," nor were sources of future funding shown. After further review, the Chief, Division of Resources, recommended by memorandum dated April 2, 1974, that a R&PP Act lease be issued for the gravel pit and sanitary landfill area, and concluded: "Once the site has served its purpose for these two uses, then an R&PP [patent] should be considered. We do not recommend a R&PP sale at this time."

By memorandum dated April 5, 1974, the Montrose District Manager, BLM, informed the State Director of the history of the case as follows:

Ouray County is faced with the problem of having to close the City dump located on national forest lands by July 1, 1974. [2/] There are two other sites in the County, both located on national resource lands, which do not meet the criteria of a sanitary landfill. Ouray County plans to clean up and abandon all three existing sites, set up a County-wide collection system and haul to one central sanitary landfill.

We have met with the Ouray County Commissioners on the proposed site and discussed the various plans and alternatives. The original proposal was to purchase the 40-acre tract for use as a gravel pit. The Commissioners were informed there was no existing law or act under which this could be accomplished and that we could issue the County a free use permit for the removal of gravel. [3/] The proposal was then altered by the County to include a sanitary landfill; we informed them that it was BLM policy not to sell land for the purpose of a sanitary landfill, however, they could lease national resource land under the R&PP Act. The County then changed their proposal to include a recreation facility, as they felt it would apply under the R&PP Act which would enable them to purchase the land rather than lease it. However, at this point I feel the practicality of this is questionable.

Prior to any resurvey or classification, an EAR [Environmental Analysis Record] reflecting the effects of the Dallas

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2/ The record indicates that the Forest Service is permitting the County to continue refuse dumping on national forest lands pending completion of appellant's efforts to secure an alternate site.
3/ In September of 1973, the County was issued a free-use permit on the tract to obtain gravel for County needs (C-13978).

> project [Bureau of Reclamation reservoir project] on this particular site, the impact the proposed action will have on the crucial deer winter range, the effect such action may have on the aesthetics, etc., will have to be completed.

By memorandum dated April 10, 1974, the State Director stated that following a review of appellant's application, issuance of an R&PP Act patent should not be considered, but rather a lease should be offered for a gravel pit and sanitary landfill site. A patent for recreation use could be considered after the gravel pit and sanitary landfill purposes had been exhausted.

On April 25, 1974, the Montrose District Office received a letter from the Colorado Department of Natural Resources, Division of Wildlife commenting on wildlife use of the land. Following an on-site inspection of the subject land, the State's Wildlife Division determined that the parcel was a critical winter range for deer, with the average utilization of the browse to be approximately 80 percent to 95 percent, and the deer days use per acre in the neighborhood of 100. The Wildlife Division also pointed out that the proposed Dallas project would inundate all of the area immediately west of the subject land, and private lands in the area were being sold for subdivision use. In light of these developments, the Wildlife Division recommended that the subject land be retained by the BLM for deer winter range. In a separate report of the same date submitted by a BLM Wildlife Biologist, similar findings were reported and the following conclusion reached:

> The subject tract occurs in a narrow belt of critical deer winter range, of which only a small percentage is in public ownership. Rapid encroachment of subdivisions on private lands within the critical winter range belt and winter range acreage inundated by the proposed Dallas Reservoir will make the subject land even more important as critical winter deer habitat in the future.

On July 1, 1974, in response to a Congressional inquiry concerning the status of appellant's application, the State Director reviewed the history of the case, noted the recommendations in the case file, and added the following:

> We have had almost uniformly bad experience with sanitary landfill operations on public land; out of more than thirty sites that are leased to western Colorado counties and municipalities, only one or two are operating in general conformity with Federal and State air, land and water quality standards. We have had about the same disappointing experience with sites sold or leased strictly for development for public outdoor recreation. * * * Few recipients of land title under the Recreation and Public Purposes Act have fulfilled their development plans; more frequently they simply have done nothing, so the public for which the site was acquired have no more recreational facilities than were available when title to the land was transferred. We have changed to a practice of issuing a lease for perhaps a five year period to see if the lessee can follow through with development as proposed. This approach has worked more effectively in getting development; the lease can be extended or in some cases title can be transferred. * * * [In the present instance] under the best of circumstances we would expect to approve the site only for lease.

Departmental review of appellant's proposal continued, and on November 21, 1974, the Outdoor Recreation Planner, Montrose District, submitted a memorandum pointing out that the County had not established that additional recreational facilities were required in the County. He additionally noted that even if such additional site were required, its location would be incompatible with a gravel pit and landfill site as the latter uses would result in unattractive gravel and garbage hauling and dumping, garbage spillage on the joint access road, as well as aesthetically displeasing noise and air pollution. He concluded that recreation sites directly related to the Dallas Reservoir Project would be more beneficial to the County.

On December 19, 1974, the District Manager informed the State Director that numerous meetings had been held with the County during which time R&PP Act policies and regulations were discussed. The County continually reiterated its position of refusing to amend its

application to pursue a lease. Thereafter, on February 4, 1975, the State Director wrote to the County informing it that it was presently BLM policy not to initially issue patents for certain R&PP Act uses, but that instead, a lease, or lease with option to purchase following development, could be issued, thus permitting the BLM to assure proper development of the land in accordance with appellant's proposed development and management plans. The State Director concluded that further consideration could be given to appellant's application if it were amended to request a leasing arrangement.

Further negotiations between the BLM and the County took place, and a lease with an option to purchase after development was again offered by the BLM, but the County stated that it would be satisfied with nothing less than a patent. Following this impasse, the BLM issued its formal decision, dated March 26, 1975, rejecting appellant's application for a patent under the R&PP Act. The BLM based its decision upon current Departmental policy which is embodied in the BLM Manual, Part 2740.06A, dated January 4, 1974, the State Director's Instruction Memorandum No. CSO-74-73, dated September 12, 1974, and the Director, BLM Instruction Memorandum No. 75-25, dated January 21, 1975. In essence, the policy enunciated in these instructions requires qualified applicants who desire to purchase lands for certain uses under the Act to initially accept a lease, or lease with option to purchase, as a step prior to obtaining a patent. This procedure assures proper development in accordance with the applicant's proposed plan of management and development. Following compliance with the proposed development plan, a patent will be issued.

In its statement of reasons on appeal, the County generally presents three arguments: (a) based upon the expenditure of substantial funds required to prepare its application, the County acquired a vested right to have the application considered in accordance with Departmental policy in effect at the time the application was filed, and retroactive imposition of the new policy violates appellant's due process rights protected by the United States Constitution; (b) the BLM failed to give appellant's application adequate substantive review; and (c) the grant of a lease will not assure development for recreation purposes because Land and Water Conservation funds will not be available without issuance of a patent. Appellant also requests that a hearing be held to resolve any factual issues in dispute.

[1] With respect to appellant's first argument on appeal, we find it without merit. As the Board recently held in Mountaineering Club of Alaska, Inc., 19 IBLA 198, 201 (1975), the rejection of an

application under the Recreation and Public Purposes Act does not violate the tenets of due process since the disposition of the application is at the discretion of the Department, and the applicant has no vested right protected by the Constitution. See also Alaska District Council of the Assemblies of God, Inc., 8 IBLA 153, 156 (1972). This conclusion is not altered by the fact that the rejection was based upon a Departmental policy change effected subsequent to the filing of appellant's application. In analogous situations, the Department has consistently held that the filing of an application for the sale, lease or permit for public lands does not entitle the applicant to any rights which preclude the Department from requiring compliance with policy changes in effect at the time the interest is to be issued, even though the changes occurred during the pendency of considering the application. Walt's Racing Association, 18 IBLA 359, 365 (1975), and cases cited therein.

As for appellant's second argument, we find that the application was given adequate substantive review by BLM personnel. One of the points stressed by the County is that issuance of a patent would not adversely affect the value of the subject land for use as a deer winter range. Appellant notes that the area has been used in the past as a County gravel pit without harm to deer usage, and that the proposed recreational development would be used for summer recreation and therefore winter grazing would suffer no injury. Our response to appellant's statement is simply to note that there appears to be no dispute on this issue since the BLM was willing to issue a lease with option to purchase. Accordingly, a lease with option to purchase arrangement, however, will give the BLM an initial supervisory role necessary to assure compliance with the proposed development plan.

[2] We now come to appellant's final argument on appeal. First of all, the Recreation and Public Purposes Act authorizes the Secretary, in his discretion, to sell or lease tracts of national resource lands. 43 U.S.C. § 869 (1970). The proposed mode for financing the development of land applied for pursuant to the R&PP Act cannot compel issuance of a patent instead of a lease if issuance of a patent would be contrary to the public interest. Thus, in the event the applicant has secured financial resources by promising acquisition of title to the land, the proper action is not for the BLM to change the applicant's tenure under the R&PP Act grant in violation of the public interest, but rather for the applicant to secure alternate financing arrangements.

Appellant's request for a hearing is denied as it does not appear that a hearing would develop facts which are material to the ultimate disposition of this case. Mojave Public Utility District, A-30596 (November 27, 1967); 43 CFR 4.415.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Martin Ritvo
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Edward W. Stuebing
Administrative Judge